No. 3005.

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

H. F. Dangberg Land & Livestock Company,

Plaintiff in Error,

vs.

H. C. Day and S. A. Foster, Co-Partners, Doing Business Under the Firm Name and Style of Day & Foster,

Defendants in Error.

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BRIEF FOR DEFENDANT IN ERROR DAY.

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STATEMENT OF CASE.

The plaintiff in error has omitted to prefix to its brief a statement of the case, as required by the rules of this court, but in lieu thereof has given merely a digest of the complaint. Moreover, in such argument on the facts as appears in its brief, plaintiff in error has proceeded in disregard of the elementary rule of

appellate practice that if there is substantial evidence in the record to support the findings the case will not be reversed on the facts,—a rule not necessary to invoke here. Indeed, plaintiff in error, with charming naivete, has resorted to the novel device of referring only to the evidence inconsistent with the findings. Under the circumstances, it will be necessary for us to make a statement of the case with somewhat more fullness than is usual in the brief of a defendant in error.

The action was brought in the United States District Court for the Southern District of California by the plaintiff in error as assignee of the Highland Cattle Company, a Nevada corporation. The defendants named were H. C. Day and S. A. Foster, co-partners, doing business under the firm name and style of Day & Foster. This firm did business in the states of Arizona and New Mexico, but not in the state of California, and the transactions in question occurred in the said states of Arizona and New Mexico. The defendant Day is a resident of Pasadena, and he alone was served with process.

The action was for the recovery of the sum of twenty thousand dollars paid by the Highland Cattle Company to Day and Foster, as part payment on a contract for the purchase of land and cattle, together with some horses, as well as certain mill sites which gave control of miles of open range, all being situate in the states of Arizona and New Mexico, and known as the Lazy B ranches and cattle, or the Lazy B outfit. The contract in question was entered into at Duncan, Arizona, on March 25th, 1913, on behalf of

Highland Cattle Company [Tr. pp. 137, 138], but delivery of the property was not to be made until in June of that year. The contract was made by one J. C. Dodson, manager of the company; and the main question in the case is whether Dodson had authority, actual or apparent, to enter into the contract.

When the contract was executed it was placed in escrow with the Bank of Duncan, at Duncan, Arizona. The contract provided for a purchase price of $250,000.00, $20,000.00 of which was to be paid down. This payment was made by a draft drawn by Dodson on the Highland Cattle Company at Minden, Nevada, for the sum of $20,000.00 in favor of Day and Foster. [Tr. p. 156.] Foster receipted for the payment. Dodson forwarded the receipt to H. C. Dangberg, secretary of the company [Tr. p. 73], (who, with Dodson and Humphrey, owned all the stock except a few qualifying shares). Dodson delivered in person to Dangberg and Humphrey, what purported to be a carbon copy of the contract. [Tr. pp. 70, 112.] This carbon copy, according to the testimony of Humphrey and Dangberg, varied from the original in escrow in that it provided for a guaranty of the delivery of 9,000 head of cattle [Tr. p. 71], while, in fact, the original was in general terms and provided for no specific number. [Tr. p. 58.] The receipt, when it reached Dangberg, also (according to the same persons), had matter interpolated in different colored ink from the body thereof [Tr. pp. 74, 157], reciting that the payment was on account of purchase price for 9,000 head of cattle. Humphrey and Dangberg both testified that they believed the

receipt as altered and the carbon copy of contract were true copies [Tr. pp. 128, 131], and that the contract was, among other things, for 9,000 head of cattle. In this belief they testified they paid the draft on March 30th, 1913. [Tr. p. 131.] Messrs. Day and Foster were both entirely ignorant of the alleged frauds of Dodson upon his associates. [Tr. p. 157.] The exact number of cattle owned by Day and Foster was unknown, as they had not been counted for thirty-one years, but the number was estimated to be about 7,000 head. [Tr. pp. 134-137.] It is never possible, in buying an entire "outfit" and "brand" of cattle running wild on the open range, to do more than make a rough estimate of the number.

The theory of the complaint is that Dodson had no authority to enter into the contract, and payment of the draft was made in ignorance of the fact that the contract did not call for 9,000 head of cattle.

The allegations regarding Dodson's want of authority were as follows:

"That at all times herein mentioned the said Highland Cattle Company was engaged in the business of cattle raising in the state of New Mexico. That for several months prior to the 25th day of March, 1913, and until the 23rd day of May, 1913, one J. C. Dodson was in the employ of the said Highland Cattle Company as manager of its cattle business in the state of New Mexico; that the only duties and powers of said J. C. Dodson, as such manager, were to employ laborers for said Highland Cattle Company, necessary to carry on its said cattle business, and to discharge any

of said laborers in his discretion, and to manage and direct said employees in the work necessary to conduct and carry on said cattle business." [Tr. pp. 26-27.]

The principal findings attacked are the second and third. The other specifications of error relate to matters of minor detail. The second finding is as follows [Tr. p. 58]:

"2. During all the times mentioned in the amended complaint the Highland Cattle Company was engaged in the business of buying and selling cattle and cattle ranches in the states of New Mexico and Arizona. That for several months prior to the 25th day of March, 1913, and until the 23rd day of May, 1913, one J. C. Dodson was the vice-president of the said Highland Cattle Company, also a director and a large stockholder therein, and was resident agent of said Highland Cattle Company in the state of New Mexico, and was manager of its business in the said states of New Mexico and Arizona; and during all the aforesaid times was acting as the manager of all its business in the states of New Mexico and Arizona."

The third finding is in part as follows:

"3. The court finds that on or about the 25th day of March, 1913, the Highland Cattle Company, a corporation, by and through its duly authorized agent, J. C. Dodson, at Duncan, Arizona, entered into a written contract with Day & Foster, which said contract was and is in words and figures as follows:" (Here follows a copy of the true contract.) [Tr. p. 58.]

The effect of the evidence bearing upon Dodson's authority (and the evidence will presently be summarized), may be stated in five propositions:

1. The Highland Cattle Company went to Arizona and New Mexico with the purpose of buying ranches and cattle and of getting control of the range; and it was engaged in carrying out that purpose when the contract with Day & Foster was made, and said contract was in furtherance of that purpose.

2. All the capital stock of the Highland Cattle Company was owned by Dangberg, Humphrey and Dodson in equal shares (except a few qualifying shares) and the business carried on under the style of Highland Cattle Company was carried on without corporation action and conducted as a partnership.

3. Dodson was general manager of the company's business, and as such had apparent authority to close the Lazy B deal and to draw the $20,000.00 draft, and he also had express authority to make such deal. It may be that Dodson had private instructions not to close unless there were 9,000 head of cattle.

4. The conduct of Dangberg and Humphrey when the alleged fraud was discovered constitute an admission that Dodson acted with authority.

5. Attempts to conceal the real facts (and the facts were peculiarly and exclusively within their knowledge) on the part of Dangberg and Humphrey and inconsistencies and improbabilities in their testimony warranted the court in inferring that Dodson had full

authority in the premises unembarrassed by private instructions.

The most important evidence in the case consists of letters that passed between Dangberg and Dodson, between January and May, 1913; and testimony given by Dangberg in a grand jury investigation of Dodson's frauds, said investigation occurring in New Mexico in September, 1913, and testimony of Dangberg at a *habeas corpus* proceedings instituted by Dodson and held June 13, 1913, in New Mexico. It should be here pointed out that during all the times in question Dangberg and Humphrey resided at Minden, Nevada (and were not in either Arizona or New Mexico, except twice, each time for a few days), while Dodson resided and was in New Mexico, near the Arizona line, practically all the time, and was general manager of the business of the three associates carried on under the name and style of the Highland Cattle Company in those states. It should also be noted that on the day before the Lazy B contract was signed [Tr. pp. 109, 124], Dodson made a contract to sell cattle to a firm known as Kidwell & Caswell with the express approval of Dangberg and Humphrey, and the cattle to be delivered under said contract were to be in part Lazy B cattle. [Tr. p. 169.] Day and Foster deposited in the Bank of Duncan bills of sale, deeds and abstracts of title [Tr. pp. 149, 150, 151], and the court found "that Day and Foster were ready and willing, and able, at all times to perform all of the terms and

conditions upon their part under the said contract of March 25, 1913." [Tr. p. 61.]

1. Nature and Purpose of the Business Carried on by the Highland Cattle Company in the States of Arizona and New Mexico.

On March 5, 1913, Dangberg wrote from Minden, Nevada, to Dodson at El Paso:

"also stated in telegram to take at least fifty thousand acres, *or sufficient to secure the range,* but from reading your letter, note that the Lazy B have taken up much of the territory and that we went over, and all of which we have given consideration, and *can see the importance of holding the Lazy B outfit in order to have complete control of the range.*" [Tr. p. 101.]

Dangberg's letter was apparently in answer to a letter from Dodson under date of February 26, 1913, in which Dodson wrote, "If James don't want to come in arrange with Frank so we can buy this and less sell down so we will get control of the range." [Tr. p. 78.]

Dangberg had previously written from Minden, Nevada, February 4, 1913, to Dodson at Lordsburg, New Mexico, as follows:

"While in the city seeing James, we will have other connections, providing James does not come in, and also note your propositions on the state land, which certainly looks good for big protection to the range." [Tr. p. 93.]

On February 28, 1913, Humphrey had written Dodson from San Francisco (after referring to his intention to go to Reno and "figure out whether we can handle the Lazy B or not") as follows:

"Of course if we could sell them all it would be wise to get their land and make a better plant of it for to run cattle and grow them up, and if there is any way we can pull it off we will try and do it." [Tr. p. 114.]

In connection with this, it is proper to mention that besides owning a thousand acres of land Day and Foster controlled the country about twenty miles each way up and down the Gila River north and south to a big range of mountains [Tr. p. 132]; that the country was open range and Day and Foster controlled it by wells protected by deeded land. [Tr. p. 134.]

Dangberg wrote on March 2, 1913:

"Just sent you a telegram, and which this is to confirm, 'Take fifty thousand at least. More if necessary. Your judgment best, depending on B deal.'" [Tr. p. 107.]

2. Highland Cattle Company's Manner of Doing Business (and Herein of Looking Through the Corporate Form.)

The Highland Cattle Company was organized in January, 1913, and appears to have been designed and used as a mere agency for carrying on the business of the Arizona and New Mexico projects of Messrs. Dangberg, Humphrey and Dodson. After the initial meeting of the incorporators there were no meetings of either the stockholders, directors or executive com-

mittee until May, 1913, when Dodson's frauds were discovered, when Messrs. Dangberg and Humphrey took off their hats and held a meeting of the executive committee. [Tr. pp. 108, 113-114.] It seems a fair inference from the fact the present suit was brought by the Dangberg Land & Livestock Company, that when the Arizona and New Mexico projects fell through the corporation had served its purpose.

In conducting their operations Dangberg, Humphrey and Dodson disregarded the ordinary rules of corporate practice. Indeed, this appears from what has already been said, but additional evidence is not far to seek. Thus the articles of incorporation provide:

"There shall be elected by the board of directors at their annual meeting, or at any meeting thereof, a general superintendent and manager of the corporation who shall office [hold] at the pleasure of the board of directors." [Tr. p. 111.]

The articles also provided for an executive committee, but an executive committee was not appointed, nor did the directors appoint a general superintendent. [Tr. p. 111.] On the contrary, Dodson was employed as general manager (how, it does not appear, but apparently by agreement between the three associates), but there was no contract of employment with him. [Tr. p. 76.] The minute book of the company is silent as to Dodson's authority "of any kind or manner authorizing [him] to purchase the Lazy B cattle." [Tr. p. 77.] Moreover, none of the officers of the company drew any salaries, and Dodson

did not draw any salary as manager. [Tr. pp. 111-112.]

At the grand jury investigation Dangberg testified that he was managing director of the corporation [Tr. p. 80], although no such position was created by the by-laws or articles.

In other ways the enterprise was regarded as a joint enterprise for profit, without reference to corporate forms. On February 26, 1913, Dodson wrote Dangberg:

"If James don't want to come in arrange with Frank so we can buy this and less sell down so we will get control of the range." [Tr. p. 78.]

In Dangberg's letter to Dodson, under date February 4, 1913, the following appears:

"While in the city seeing James, we will have other connections, providing James does not come in." [Tr. p. 93.]

On April 3rd Dangberg wrote Dodson:

"Frank went to see the James Boys, and they have taken over a large tract in California, thus making them impossible, and of which we are glad, as we will either bring in better people, or handle it among ourselves, and I am rather in favor of not cutting it up any more than we have at present, thus being better for us all, if we can arrange for the handling of same." [Tr. p. 107.]

In a letter of March 5, 1913, Dangberg wrote:

"We are anxious to not take in a fourth party, as

we believe that we have arranged the financial end of it, providing we can make contracts at that end, so as not to receive any additional assistance." [Tr. p. 101.]

Having his attention called to the above, Dangberg testified:

"Q. Who were the three already in that you mean by that?

A. Humphrey, Dodson and myself.

Q. And you did not want to take in a third party?

A. Yes.

Q. And you were all equal owners in the deal at that time?

A. Supposed to be." [Tr. p. 101.]

On April 21, 1913, Dangberg wrote Dodson:

"Nichols and Litch were up with Frank [Humphrey] yesterday, and put up their thirty thousand, thus making some forty thousand dollars cash on hand; also that Frank is carrying twenty thousand and we are carrying twenty thousand additional for company account, and the other people are ready to dig up an additional twenty thousand, so you see we will have one hundred thousand absolute to make the turn." [Tr. p. 104.]

The methods used in handling several deals bears the same way. Dangberg testified there were two Wilson deals.

"One was the Wilson deal originally before we organized the Highland Cattle Company in 1912. I believe it was the month of November or December.

That was a deal whereby *we were buying* from Wilson a certain number of head of cattle at $25.00 per head; that is where Dodson bought personally from Wilson. On the 20th day of November, 1912, in El Paso, I assumed part of that contract. * * * I did not think I was taking over one-half of the Wilson contract; that was the Robinson contract. I found out afterwards that the Wilson contract was merged into the Robinson contract." [Tr. p. 110.]

Another version of the same transaction given by Humphrey appears at pages 110 and 120 of the transcript. In another deal known as the Kidwell deal, Dodson drew upon the Highland Cattle Company for $20,000.00, signing the draft "J. C. Dodson, buyer." [Tr. p. 123.] Dodson also drew a draft upon Kidwell and Caswell for $9,000.00, payable to himself or order. [Tr. p. 124.] Regarding the $20,000.00 draft, Humphrey testified:

"Mr. Dodson stated that he would have to pay O. C. Wilson $20,000 right away, and I told him to go ahead and draw a draft for $20,000 to Wilson as he had to go somewhere to meet him." [Tr. p. 127.]

On April 22, 1913, Dangberg wrote Dodson: "believe that when Frank gets down there that you will make some more deals." [Tr. p. 105.]

3. The Scope of Dodson's Authority.

On June 13, 1913, Dangberg testified in part as follows before the *habeas corpus* proceedings:

"At the time of this transaction Dodson was manager of the Highland Cattle Company. [Tr. p. 164.]

He was sent down there to conduct the business of this corporation in this region, and that business was to be the business of buying and selling cattle. [Tr. p. 165.] It was understood in deals that he was to advise before he paid and in ordinary expenses he did not need to. [Tr. p. 166.] This proposition of deals that I spoke of. By deals I mean the purchase of cattle and ranches. That was, he presented the deal to the board of directors before the sale was consummated. It was that no one of the directors could do business without the knowledge of the rest of the directors. Mr. Dodson was one of the directors. [Tr. p. 167.]

Q. And that the manager couldn't do business in buying and selling ranches and cattle without the authority of the board of directors?

A. Without a subsequent authorization or knowledge of the board of directors." [Tr. p. 168.]

The following is from Dangberg's testimony before the grand jury in September, 1913:

"I told him (Dodson) that I would take the matter up with the president, Mr. Humphrey, and I thought we could make the deal on that basis and could raise the money and go through with it. After talking it over WE AUTHORIZED HIM TO GO AHEAD AND MAKE THE DEAL on his representations." [Tr. p. 87.]

Before the deal was closed by Dodson, Dangberg and Humphrey went over the range and looked at the cattle. They went to Ducan, Arizona, with a view to seeing Mr. Foster, but gave up the idea because of

an excuse made by Dodson, who told them that Foster was an old man and ill. [Tr. pp. 112-118.] After the discovery of the frauds in May, 1913, Dangberg admitted that Humphrey and himself did not take the matter up directly with Foster because Dodson had commenced the deal and they thought it was better to let him see it through. [Tr. p. 162.]

Turning now to the correspondence regarding the sale of cattle by Dodson. On January 29th Dangberg advised Dodson of the presentation of a draft of $10,000.00 drawn by Dodson on the company, and concluded with the following paragraph:

"Before closing will ask that when you draw any checks or drafts that are to be paid at this end that you wire if amount be large; also follow up with written instructions immediately so as to protect this end, thus to make it impossible for an outsider to slip one over on us." [Tr. p. 98.]

Dangberg wrote Dodson under date of February 1, 1913:

"We will be perfectly satisfied with whatever you may do in the premises, but we kind of feel as though selling old cows would be better than to sell the yearling heifers." [Tr. p. 91.]

On March 24, 1913, Dangberg wrote Dodson:

"We have been wondering whether or not you could close out the Wilson contract on the last two lots as a whole and to our advantage, meaning holding the mills, etc., but of course you have thought of this,

undoubtedly, and we know that you will make your deals to our best advantage." [Tr. pp. 95-96.]

On April 3, 1913, Dangberg wrote Dodson, stating that Humphrey would soon join him on new proposed deal. Apparently for the sale of cattle. The writer then goes on to state that he "will abide by the decision of you and Frank." [Tr. p. 106.]

On April 21, 1913, Dangberg wrote:

"I note that you have a chance to buy two thousand cows, but as Frank expects to leave here by the 7th of next month, and also after talking with him yesterday, am going to advise that you hold the said trades in abeyance, or take twenty days' option with no payments, thus not binding yourself until Frank's arrival." [Tr. p. 103.]

On April 22, 1913, Dangberg wrote (already quoted):

"Believe that when Frank gets down there you will make some more deals." [Tr. p. 105.]

Dodson's act in drawing on company for $20,000.00. and the transaction regarding the check for $9,000.00, and the Wilson and Caswell deals, have already been sufficiently referred to. [See Tr. pp. 97, 110, 121, 123, 124, 127, 129.]

Dodson was resident agent for the Highland Cattle Company in New Mexico, and was also vice-president of the company. [Tr. p. 58.] The articles provided:

"The president shall be the chief executive officer

and head of the company, and in the recess of the board of directors and of the executive committee shall have general control and management of its business and affairs." [Tr. p. 108.]

"The vice-president shall be vested with all the powers and shall perform all of the duties of the president in his absence." [Tr. p. 109.]

The business of the corporation was carried on in New Mexico and Arizona, and Humphrey, the president, resided in Nevada, and was in New Mexico only on one or two occasions.

4. The Lazy B Purchase Was a Long Cherished Plan.

From the time the corporation was organized, in January, 1913, it was the main purpose of all three associates to find a way to "put over" the Lazy B deal. That was the theme of practically every letter passing between them and appearing in the record covering the whole period from January to May, and was the subject of many conferences and several long pilgrimages by Dangberg and Humphrey all the way to New Mexico.

On January 29, 1913, Dangberg wrote to Dodson, "Trust that will be prepared with all finances necessary to put over the Lazy B deal." [Tr. pp. 97-98.]

On February 4, 1913, Dangberg wrote Dodson, "Am truly hopeful that you will have things lined up for the Lazy B by the time Frank and I reach there." [Tr. p. 92.]

On February 9, 1913, Dangberg wrote Dodson, "Everything is all fixed at this end and we will have all finances in shape to handle the contemplated deal." [Tr. p. 99.]

On February 25, 1913, Dangberg wrote Dodson from Los Angeles:

"Hope you can tie up on the B, as it all looks good and no other looks so good to the west of us." [Tr. p. 99.]

On February 28th, 1913, Humphrey wrote Dodson that he would go to Reno and figure on whether they could handle the Lazy B. He proceeded:

"It would be wise to get their land and make a better plant of it for to run cattle and grow them up, and if there is any way we can pull it off we will try and do it." [Tr. p. 114.]

On March 2 Mr. Dangberg wrote Dodson:

"Have just telephoned Frank, in Reno. We are to be in Carson together tomorrow to decide on the Lazy B matter * * * trust you will use your best judgment in the premises. We will either bring in better people or handle it ourselves." [Tr. p. 107.]

On March 5th, 1913, Dangberg again wrote Dodson:

"Was with Frank in Carson yesterday talking over the Lazy B matter, asking you the last possible date you had on making the Lazy B deal; also that I thought it best that I should go down again and be with you and thus to assist you in contracts, etc., as I would have to use these contracts to some extent in securing the necessary loan for this extra deal." [Tr. p. 100.]

On March 24th Dangberg wrote Dodson another letter, in which he said that on account of market conditions they "feel a little anxious as to what you may do on your contracts, * * *. We are both anxious for the Lazy B deal and hope to hear from you before the week ends regarding the same." [Tr. p. 95.]

In Dodson's telegram to Dangberg announcing that he had "closed deal with Lazy B. paid check twenty thousand" he also said "made contract for sale of cows and steers subject to your approval." (This was Kidwell, Caswell and Metzer contract.) [Tr. p. 109.]

Dangberg and Humphrey both testified that in their talks with Dodson at Duncan, Arizona, on February 15, 1913, and at Santa Fe, New Mexico, on March 13, 1913, Dodson told them

"He could buy the Lazy B cattle at $27.00 per head, and all the lands and calves from October, all suckling calves thrown in in the bargain." [Tr. p. 112; see, also, Tr. pp. 76, 77.]

5. Conduct of Dangberg and Humphrey on Discovery of Dodson's Frauds.

Between the time of the discovery of the fraud, in May, 1913, and the filing of the present suit, in January, 1914, neither Dangberg or Humphrey ever questioned Dodson's authority. [Tr. p. 143.] On May 23, 1913, the day on which Dodson's fraud was discovered, Dangberg told Foster that Dodson had never made a contract that was what he represented it to be. [Tr. p. 142; see, also, 158-159.] The next day, at

Lordsburg, Foster prevented Dangberg and Humphrey from shipping some of the Lazy B cattle which they had loaded on the cars, stating that they would have to put up their money in the bank at Duncan before they could ship any of the cattle. The cattle were thereupon unloaded and turned loose. [Tr. 143.]

In June, 1913, Dangberg met Day and Foster at Duncan, Arizona. [Tr. pp. 143-144.] Dangberg asked Day to release him from the contract. [Tr. p. 162.] Dangberg admitted that he had looked over the ranges and cattle prior to the making of the contract. Day asked him why he had not talked to Foster, and he replied, as already pointed out, that Dodson had commenced the trade and he thought he had better let him finish it. [Tr. pp. 162-163.] Later on in the same month Dangberg talked to Mr. Day about going on with the contract provided he could borrow $100,000.00 from Day at six per cent. [Tr. p. 163.] In one of the conversations Day told Dangberg that the bogus contract and the altered receipt were fraudulent on their face, because 9,000 head of cattle were worth more than the purchase price reserved, and it would let the other property go for nothing. Dangberg kind of laughed and said "we did think we had a good deal." [Tr. pp. 143, 144, 162, 163.]

6. Attempts at Concealment, Inconsistencies and Improbabilities in the Testimony of Dangberg and Humphrey.

The attempts at concealment of material facts, and the inconsistencies and improbabilities in the testimony of Dangberg and Humphrey are best appreciated

by a perusal of their testimony, but we will give a few of the most glaring instances.

Early in his cross-examination Dangberg was asked whether the Highland Cattle Company was endeavoring to get control of a large section of the range. He replied, "Well, not particularly, no. They had all of these few bunches of cattle and they were just trading around in the country, as far as I could see." [Tr. p. 119.]

Before being impeached by the testimony before the grand jury Dangberg stated that Dodson was not general manager of the company. [Tr. p. 79.] When first asked whether Dodson had been authorized to go on with the deal as it had been explained to Dangberg and Humphrey in Arizona and New Mexico in February and March, 1913, Dangberg replied:

"We authorized him to go ahead and get an option." [Tr. p. 88.]

Dangberg further testified that they left no matters to the discretion of Dodson,—that everything had to be submitted to himself and Humphrey. [Tr. p. 90.]

Humphrey testified that he did not consider Dangberg and himself on equal terms with Dodson, and he considered that Dodson was "just working on these trades down there and corresponding with us" [Tr. pp. 115-116]; that Dodson informed him that the Lazy B people were going to throw in all their land for nothing [Tr. 117]; that he did not know that Day and Foster had a thousand acres of cultivated land alone worth about $50,000.00 [Tr. 117]; that Dodson pointed out the two or three mills belonging to Day and Fos-

ter, but he did not consider the range of any particular value at that time. That "we didn't know anything about it. We were buying cattle." [Tr. 118.]

Mr. Foster testified:

"They asked me if the receipt was like it was when I signed it. I told them no, and said this 9,000 head was written in there, because we didn't guarantee any number, and I says, 'You can see this is in a different ink,' and Mr. Dangberg says, 'It is fading.'" [Tr. pp. 145-146.]

It is also in order to point out that the reasonable market value of the range property of Day and Foster on or about the 23rd day of March, 1913, was $50,000.00, and that on that day in Arizona the market price of range cattle was $30.00 a head and of calves $50.00 a head [Tr. pp. 133, 153, 154]; so that 9,000 head of cattle alone were worth more than the purchase price carried in the contract.

BRIEF OF ARGUMENT.

I.

Dodson Had Authority to Enter Into the Contract and Secret Limitations or Private Instructions Were Not Binding on Day and Foster.

It is too clear to require elaboration that Messrs. Dangberg, Humphrey and Dodson, operating as the Highland Cattle Company, were engaged in buying lands and cattle in Arizona and New Mexico, and endeavoring to get control of the range; and that the contract in question was in furtherance of these pur-

poses. It was, therefore, within the scope of the authority of Dodson as general manager of the company. Moreover, it appears from the evidence that he was expressly authorized to enter into the contract. It may be conceded for present purposes that Dangberg and Humphrey understood that the contract was to carry 9,000 head of cattle rather than approximately 7,000. This raises the question whether private instructions to Dodson or secret limitations on his authority would avoid the contract.

The point here involved has been passed upon by the United States Supreme Court, as well as by the Supreme Court of Arizona, the state in which the contract was made. Both courts have accepted and applied the familiar principle that "the authority of an agent in any given case is an attribute of the character bestowed upon him in that case by the principal" (Mechem on Agency, 2nd Ed., sec. 709); and third persons are concerned with the apparent authority of the agent, and not bound by secret instructions or limitations inconsistent therewith.

The case of Northern Railway Company v. O'Connor, 232 U. S. 508, arose on an action against the railway company for the value of goods shipped. The Boyd Transfer Company of Minneapolis acted as a forwarder by railroad by collecting from different shippers small loads of goods sufficient in the aggregate to fill a car. At the time of the shipment referred to in the case, the railway company had four rates on household goods. While these tariffs were in force the Boyd Transfer Company was employed by the

plaintiff, on terms not stated, to box, transfer and ship certain property which she desired to have sent to Portland, Oregon. The Boyd Company shipped the goods as "emigrant movables," "released to $10 per cwt.," and naming "Boyd Transfer and Storage Company, shipper." The goods were lost in transit. The plaintiff testified that the Boyd Company, in soliciting the shipment, had stated that it had a through car, but said nothing about shipping her effects as household goods, and she understood that they were to be shipped as a separate consignment; also that she had stated to the transfer company that her goods were new, and that as she had no insurance she was willing to pay the regular rates. A judgment for plaintiff was reversed by the Supreme Court. The portion of the opinion dealing with the question of private instructions and secret limitations on the authority of an agent is as follows:

> "The plaintiff contended, however, that she had expected her goods to be transported as a separate consignment. But the transfer company had been entrusted with goods to be shipped by railway, and, *nothing to the contrary appearing, the carrier had the right to assume that the transfer company could agree upon the terms of the shipment, some of which were embodied in the tariff. The carrier was not bound by her private instructions or limitation on the authority of the transfer company,* whether it be treated as agent or forwarder. If there was any undervaluation, wrongful classification, or violation of her instructions, resulting in damage, the plaintiff has her remedy against that company." (Pages 514, 515.)

In Insurance Company v. Wilkinson, 13 Wall. 222, it was held that the insurance company was bound, by an application filled out by its solicitor, and deviating from the printed form, although the solicitor's actual authority was only to receive and transmit applications and premiums. Mr. Justice Miller, who wrote the opinion, said:

> "The powers of the agent are, *prima facie,* coextensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals." (Page 235.)

To the same effect is

Insurance Company v. McCain, 96 U. S. 84.

In El Paso Livestock Commission Co. v. Colorado Livestock Commission Co., 171 Fed. 20, 96 C. C. A. 262 (8th Circuit), it was said:

> " 'That, where one holds another out to the world as his agent, in determining the liability of the principal the question is not what authority was intended to be given to the agent, but what authority was a third person dealing with him justified, from the acts of the principal, in believing was given to him.' " (Citing numerous cases.)
>
> 171 Fed. 24.

In Lamon *et al.* v. Speer Hardware Co., 198 Fed. 453, 119 C. C. A. 1 (8th Circuit), it was held that authority to sell a cotton gin plant and appurtenant machinery carried with it apparent authority on the part of the agent to agree in order to make the sale to set up the plant and machinery and put it in running order. Sanborn, J., said in part:

"A principal is as conclusively bound to innocent third parties by the act of his agent in the exercise of the apparent authority within the scope of his agency with which his master clothes him as he is by the actual authority conferred upon him." (Citing cases.)

198 Fed. 457-458.

In Swift & Co. v. Detroit Rock Salt Company, 233 Fed. 231 (C. C. A. 6 Cir.), the court said:

"Rude was the agent of defendant and was given charge of its office and correspondence for the express purpose of selling its salt. The rule is settled that, in the absence of notice otherwise, 'parties dealing with an agent have a right to presume that his agency is general, and not limited * * * and the presumption is that one known to be an agent is acting within the scope of his authority,' and also 'that the authority of the agent must depend, so far as it involves the rights of innocent third persons who have relied thereon, upon the character bestowed, rather than the instructions given.'" (Citing cases.)

233 Fed. 234.

In California Development Company v. Yuma Valley etc. Co., 9 Ariz. 366, 84 Pac. 88, the Development Company was represented at Yuma by an agent. The agent, under instructions from the vice-president and general superintendent, leased a dredge, disregarding the instruction not to lease unless it was insured. The instruction last referred to was held not binding upon the lessor.

In Leavens v. Pinkham *et al.*, 164 Cal. 242, a principal, whose business consisted in large part of buying fruit, put an agent in charge of his business in a certain locality as manager thereof. A third person dealing with the agent in good faith was held not bound by a secret limitation as to price. The court said in part:

> "It will not be questioned, we assume, that where an agent is by his principal put in charge of a business in a certain locality as the manager thereof, he is clothed with apparent authority to do all things that are essential to the ordinary conduct of the business at that place. If the business consists in large part of the buying of fruit, as we must assume under the evidence it did in this case, he is apparently clothed with authority to buy for his principal. Such acts are within the apparent scope of his employment, and third persons acting in good faith and without notice of or reasons to suspect any limitation on his authority, are entitled to rely on such appearances."
>
> 164 Cal. 248.

Another instructive case is Crews v. Ganeau, 14 Mo. App. 505.

A corollary to the proposition that a third person is not bound by secret limitations upon the authority of the agent is found in the rule that third persons are not obliged to inquire into and ascertain the authority of corporate agents.

In Louisville etc. R. Co. v. Louisville Trust Co., 174 U. S. 552, the court said:

> "In Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604, this court stated, as an axiomatic principle in the law of corporations, this proposition: 'Where a party deals with a corporation in good faith—the transaction is not *ultra vires*—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them."
>
> 174 U. S. 573-574.

See also:

Swift v. Detroit Rock Salt Company, 233 Fed. 231, 234-235;

Mechem on Agency, 2nd Ed., Sec. 762.

At page 31 of our adversaries' brief the following occurs:

"In the case of Starbird v. Curtiss, 43 Me. 352, it was held that an agent authorized to purchase a one-sixteenth part of a ship at $40.00 a ton did not bind his principal by purchasing the same at $44.00 per ton.

"Likewise in Day v. Snyder, 130 S. W. 716, it was held that where terms and conditions of the purchase

are limited by the principal, the agent has no authority to purchase differently."

The cases cited differ widely from the case at bar on their facts, and neither of them discusses the doctrine of apparent authority or limitations upon the same, and said cases are in no way in point here.

In Starbird v. Curtiss, *supra,* the action was in *assumpsit* on a money count for the recovery of a part payment made upon the purchase price of an interest in a ship that was being constructed. The plaintiff was informed by one Potter that the ship was being constructed at $40.00 per ton, and that Potter had agreed to take one-sixteenth at that price. The plaintiff agreed with Potter that he would take another sixteenth at the same price per ton, and paid $600.00 which came into the hands of defendants by the hands of said Potter, and for which they gave their receipt on account of the ship. There is nothing in the report to suggest that Potter knew the real facts. The case went to the upper court on the instructions, and both the instructions and the opinion of the reviewing court are silent on the questions here under discussion. The gist of the matter is that Potter, as well as the plaintiff, were under a misapprehension as to the terms of the contract, and Potter was not an agent in charge of the plaintiff's business.

In Day v. Snyder Brokerage & Storage Company, *supra,* the defendants in Texas wrote a broker in New York to purchase for them certain goods, among others walnuts, and specified that the walnuts should be "new

walnuts." The action was to recover for the price of *old walnuts* purchased by the broker from the plaintiff. Apparently the defendant had no business in New York,—at least the broker was not in charge of any business for him. As already suggested, there is no discussion in the opinion of the questions before this court, and the only authority cited in the case deals with the question of purchase by sample.

Plaintiff in error devotes several pages of its brief (pages 27-31) to the contention that a third person dealing with an agent is at his peril required to ascertain the agent's authority. It takes onlv a moment's reflection to see that if this contention were accepted in all its rigor there would be no place for the doctrine of apparent authority. This is clearly pointed out in Corpus Juris; Title, Agency (a work many times referred to by plaintiff in error, and cited in this connection).

> "*Qualification of General Rule.* Where the third person has ascertained the general character or scope of the agency, he is authorized to rely upon the agent having such powers as naturally and properly belong to such character, and, in the absence of circumstances putting him upon inquiry, is not bound to inquire for secret qualifications or limitations of the apparent powers of the agent."
>
> 2 C. J., pp. 564-565.

The cases cited at the pages in the brief just given do not deny the qualification thus stated.

Lauer Brewing Co. v. Schmidt, 24 Pa. Superior Court 396, only holds that the general collector of a

Brewing Company, who was in effect engaged in the business of opening new accounts and settling accounts with customers, had no authority to make a contract with customers by which the latter were to receive compensation for services, and to be relieved from liability for accounts not collected.

In Bank of Commerce v. Baird Mining Co., 13 N. M. 424, 429, 85 Pac. 970, it was held that the general manager of a mining company did not have authority to draw drafts upon his principal, the drafts being for his own use and not in connection with firm business, such as the purchase here of land and cattle by Dodson. The case dealt with the question of ostensible rather than apparent authority. The inquiry was whether there had been a sufficient course of dealings to establish ostensible authority.

In Franklin v. Havalena Mining Co., 16 Ariz. 200-208, 141 Pac. 727, it was held that officers of a corporation as such have no authority to lease or sell company property.

In Brutinel v. Nygren, 154 Pac. 1042 (Ariz.), it was held that when one was constituted an agent to find a purchaser of a drug business and not to effect the sale thereof, he had no authority to agree to pay a commission on the sale.

It is urged by plaintiff in error that Dodson did not have authority to execute the contract by reason of his being general manager. The vice of the argu-

ment consists in the assumption that the corporation was "engaged in the business of buying and selling cattle, and owning about 3,000 head of cattle." (Page 22.) As pointed out in "the statement of the case" prefixed to this brief, the company was engaged in the enterprise of buying land and cattle with a view of getting control of the range. It did not merely own and operate a small ranch; it was essentially a trading company.

The cases cited by counsel in this connection are all distinguishable.

In Blen v. The Bear River etc. Co., 20 Cal. 602, the business of the corporation consisted in conveying water through ditches, and it was held that the president of the corporation had no authority to contract for a new ditch. The corporation in that case was not buying and selling ditches or undertaking to get control of the water business of the district.

In Manhattan Liquor Company v. Magnus, 43 Tex. Civ. App. 463, 94 S. W. 1117, the purpose of the corporation was the operation of a single saloon, and it was held that the managing agent had no authority to purchase another saloon.

Trephagen v. South Omaha, 69 Neb. 577, 96 N. W. 248, is wide of the mark, as appears from counsel's own statement of the case. There the corporation was engaged in the business of caring for livestock consigned for sale, and the general manager was held without authority to sign a petition for paving a city street.

In Bond v. Pontiac etc. R. Co., 62 Mich. 643, 29 N. W. 482, the railroad company, having delegated the construction of its depots to an investment company, it was held that the chief engineer of the railroad company had no authority to contract for the construction of such depots.

In Hurley v. Watson, 68 Mich. 531, 36 N. W. 726, it was held that the chief clerk and bookkeeper of a coal company had no implied or apparent authority to offset debts due the firm from a customer against obligations of his own due to such customer.

In Gregory v. Loose, 19 Wash. 599, 54 Pac. 33, it was held that an agent employed as manager of a shingle mill, with authority to contract for and estimate shingle bolts subject to the approval of his principal, had no implied authority to contract for the construction of a logging road to timber purchased by his principal.

II.

The Highland Cattle Company Was a Mere Alter Ego of Dangberg, Humphrey and Dodson; and Dodson as Partner or Co-Adventurer Had Authority to Enter Into the Contract and Draw the Draft.

The fact that the Highland Cattle Company was a corporation presents a false quantity in this case. The acts of the three associates were entirely uninfluenced by the circumstance of incorporation. Their adventure for profit was carried on precisely as though no

corporation stood between themselves and the outside world. Had they merely adopted the name and style of the Highland Cattle Company without incorporation, they could not have carried on their business differently.

Two late cases in this court make unnecessary an extended discussion of the principle that courts will look through the corporate form to the substance and reality of things when justice demands.

Norma Mining Co. v. Mackay, 241 Fed. 640;
Linn etc. Co. v. U. S., 196 Fed. 593, 116 C. C. A. 267.

It is settled by the authorities that this principle is operative in courts of law as well as in courts of equity.

Sargeant v. Palace Cafe Co., 54 Cal. Dec. 161 (Aug. 16, 1917);
Higgins v. California Petroleum Co., 147 Cal. 363;
Ford v. Chicago Milk Shippers Association, 155 Ill. 166, 39 N. E. 651;
Home Fire Insurance Co. v. Barber, 67 Neb. 644, 108 Am. St. 716;
State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279;
Richardson v. Buhl, 77 Mich. 632.

Moreover, the business as carried on by Messrs. Dangberg, Humphrey and Dodson was not corporate business, because the acts of the associates were done without going through any of the forms prescribed by law.

The scheme of corporate organization and management prescribed by law is exclusive.

> Taylor v. Griswold, 13 N. J. Law 222, 27 Am. Dec. 33;
>
> State v. Anderson, 31 Ind. App. 34, 67 N. E. 207;
>
> Durkee v. People, 155 Ill. 354, 46 Am. St. 340.

In the present case, therefore, the acts of Dodson were acts of the three associates and not of the corporation.

Shorb v. Beaudry, 56 Cal. 446, is an instructive case on the present point, because in that case the matter of looking through the corporate form was not complicated by any question of fraud or attempt at circumvention of positive law. It was held in that case that parties who formed a corporation for the purpose of acquiring lands and water rights and of developing the same, had by the conduct of their affairs constituted themselves a partnership. The court said in part:

> "That the corporation was formed as a mere agency for more conveniently carrying out the agreements between Temple, Beaudry and Wilson, is sufficiently apparent. As a corporation, it paid nothing, incurred no liability, and was not to receive any part of the proceeds of the sales of land, except for the purpose of developing and improving the property held by it. All the profits were to be distributed among the three members of the association, in the proportion fixed by their contract. No certificates of stock were ever issued by the corporation, nor

> was it contemplated that any ever should be. * * *"
>
> 56 Cal. 450.

In the recent case of Sargent v. Palace Cafe Co., 54 Cal. Dec. 161, the action was against the corporation on a promissory note. At the time the note was executed Sargent was the owner of all the shares of stock except two qualifying shares. The consideration for the note was the transfer by Sargent of his stock to one of the qualifying stockholders. Both persons were directors of the corporation. The action was defended on the ground that the note was void because the directors dealt with property or credit of the corporation to their own advantage. A judgment for plaintiff was affirmed, the court saying in part:

> "The purchaser and seller of the business preferred to act through the corporation; no one was deceived; the bargain was partly consummated even to three payments of interest on the note here in litigation; and we find no proper excuse in the record for the attempt to interpose technical defenses to the payment of the note executed as a part of the purchase price." (Page 162.)

Other instructive cases in this connection are Miller & Lux v. Eastside Canal Co., 211 U. S. 293, in which it was held that a corporation organized in Nevada for the purpose of enabling the incorporators to litigate in the Federal courts in California, was not entitled to sue in such courts; and United States v. Lehigh Valley Railroad Company, 220 U. S. 257, in which it was held that the Hepburn Act was infringed by a

railroad carrier, which by the exercise of its power as a stockholder in a manufacturing, mining and producing corporation deprived the latter of independent existence and made it virtually an agency or dependency or department of the carrier.

It is submitted that the Highland Cattle Company was a mere creature of Messrs. Dangberg, Humphrey and Dodson, and by reason of that fact and their conduct in themselves disregarding the corporate entity, they were in effect partners, with the result that private limitations upon the authority of Dodson were not binding upon Day and Foster.

> Kimbro v. Bullitt *et al.*, 22 How. 256, 266-267;
> Winship v. Bank of U. S., 5 Peters 529.

III.

"When a Question Arises Between Two Innocent Parties, Which of Them Shall Suffer by the Misconduct of Another, the Loss Must Fall Upon Him Who Has Enabled the Wrong to Be Committed and Not on Him Who Had No Means of Knowing That It Was a Wrong."

> Calais Steamboat Co. v. Scudder, Admr., 2 Black 372.

One of the main applications of the principle above stated has been to the law of agency. In the case cited:

> "a person residing in California, employed an agent to contract for, and superintend the building of a ship at New York. The agent was furnished with funds for the purpose, and specially

directed by the principal to give himself out as the true owner, and to conceal the interest of the principal. Accordingly the agent made all contracts in his own name, and had the vessel registered as his own property. After she was finished he sold her, and put the price in his pocket: *Held,* that the principal's right in the vessel was gone, unless he could prove that the vendee had notice of his right before payment of the purchase money." (Syllabus.)

The authorities on this subject are legion. The California cases contain clear expositions of the controlling principles, and show that if Dodson defrauded his principal the loss must rest where it has fallen, especially as Day and Foster got legal title to the money paid.

Schultz v. McLean, 93 Cal. 329;
Shirey v. All Night & Day Bank, 166 Cal. 50;
Fowles v. National Bank of California, 167 Cal. 653;
Northwestern Portland Cement Co. v. Atlantic Portland Cement Co., *et al.,* 53 Cal. Dec. 137 (Jan. 29, 1917).

See also:

Whittle v. Vanderbilt etc. Co., 83 Fed. 48, 55-56 (C. C. S. D. Cal.)
California, C. C. 3543.

IV.

The Court Was Justified in Drawing the Inference That There Were No Secret Limitations Upon the Authority of Dodson, (a) Because Dangberg and Humphrey Attempted to Conceal the True Facts and Give False Testimony, and (b) Because of the Long Cherished Purpose and Plan to Make the Lazy B Deal, and the Acts and Declarations of His Associates Concerning It.

The facts regarding the actual agency of Dodson and the scope of his actual authority were peculiarly and exclusively within the knowledge of Dangberg and Humphrey, except insofar as some of them came to defendant by chance. It is, of course, somewhat uncertain what the testimony might have been had the defendants been so unfortunate as not to have had some of the correspondence that passed between Dangberg and Humphrey on the one hand and Dodson on the other, and to have had a transcript of *habeas corpus* and grand jury proceedings in New Mexico. But it is significant that the complaint alleged Dodson's only authority was to hire ranch help and pay for the same and inquire regarding deals and report the results of his inquiries to Dangberg; and it is worthy of note that the plaintiff produced only one letter sent by Dodson, the other letters in evidence being those of Dangberg and Humphrey. The transcript of the evidence is also illuminating on this subject. Sufficient instances have been given in the foregoing "statement of the case" to show that both Dangberg and Humphrey tried

to conceal the true facts regarding Dodson's authority, and in the endeavor so to do became involved in a maze of contradictions and falsehoods.

Lord Mansfield laid it down as a maxim that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted." (Blatch v. Archer, 1 Cowp. 63, 65.) This maxim has been codified in California in the Code of Civil Procedure, section 2061, subdivision 6.

The court below was not obliged to believe the testimony of Humphrey and Dangberg regarding secret limitations, and instructions.

In Blankman v. Vallejo, 15 Cal. 638, 645, the court said:

> "We do not understand that the credulity of a court must necessarily correspond with the vigor and positiveness with which a witness swears. A court may reject the most positive testimony, though the witness be not discredited by direct testimony impeaching him or contradicting his statements. The inherent improbability of a statement may deny to it all claims to belief."
>
> (15 Cal. 645.)

Our Code of Civil Procedure, Sec. 1963, gives as a presumption:

> "5. That evidence wilfully suppressed would be adverse if produced."

In Jones on Evidence (2nd Ed.), section 18, it is said:

> "Such act may throw suspicion on all other evidence produced by [the destroyer of documents]."

In Del Campo v. Camarillo, 154 Cal. 647, 666, it was said:

> "Evidence withheld is presumed to be adverse."

In Parsons v. Weis, 144 Cal. 410, the court said:

> "The respondent herself endeavored to get before the trial court the want of any reasonable or plausible pretense for the said averments in the complaint in the former action, but appellant frustrated her efforts, in that respect, while offering nothing himself on the subject. * * * It appears, therefore, that the respondent proved that said averments were, in fact, false; that she made reasonable efforts to show that appellant had no plausible grounds for said false averments, to which efforts appellant objected; and that appellant, having the ability to show whether or not the averments were wilfully false, simply stood mute. Considering these things, the court was warranted in finding that the false averments were wilfully false."
>
> 144 Cal. 420-421.

In connection with the testimony of Dangberg and Humphrey to the effect that there was a secret limitation regarding nine thousand head of cattle. consider the fact that nine thousand head of cattle alone had a market price in excess of the entire purchase price provided in the contract. Martin, a duly qualified witness, placed the value of the cattle at $32.00 a head [Tr. p. 154]. In one of Dangberg's letters Dodson is

told that he will make "31 or 33 for yearlings" [Tr. p. 99]. In the Kidwell contract, made the day prior to the making of the Lazy B deal, and which was to be filled with the Lazy B cattle, the prices were $28.00 for yearling steers and $40.00 for two, three and four-year-old steers, and up [Tr. pp. 121-122]. If even $30.00 a head on the average were taken as a basis, the market value of nine thousand head of cattle would have been $270,000.00; yet the contract price was only $250,000.00, and the contract carried, in addition to the cattle, ninety horses, a thousand acres of cultivated land, three hundred of which were under ditch, all the ranch equipment, and control of a range twenty miles square, by virtue of the ownership of wells protected by deeded land. Moreover, the interpolation in the receipt regarding nine thousand head of cattle was in different colored ink from the body of the receipt; and when Dangberg was confronted with this, the only explanation he could vouchsafe was, "It is fading" [Tr. pp. 145-146].

And it may again be suggested that the plaintiff failed to produce any of Dodson's letters, except one, and staked their entire proof regarding his authority, as well as the pretended limitations upon the same, on the testimony of Humphrey and Dangberg, both of whom were thoroughly discredited witnesses.

The main problem in "putting over the Lazy B deal" was how to finance it; and all the associates agreed upon the plan of "selling down close"; and in carrying out this approved plan Dodson did not close the Lazy B deal until he had made a contract to sell part of the Lazy B cattle to Kidwell, Caswell and

Metzer. [Tr. p. 121.] Nor did Dangberg and Humphrey attempt to repudiate the contract with Day & Foster until release of said Kidwell contract had been effected [Tr. pp. 141-142].

It is submitted that the above facts and circumstances clearly justified the court below in drawing the inference that there were no secret limitations upon the authority of Dodson.

V.

There Was No Error in Excluding Testimony of a Conversation Between Dodson and Dangberg and Humphrey After the Execution of the Contract.

Plaintiff in error has specified the exclusion of such evidence as error (its brief, p. 9).

The only purpose for which such evidence could have been relevant was to negative ratification. Plaintiff in error seems to concede this, and the authorities cited by him deal only with declarations of the agent on the issue of ratification. (Its brief, pp. 14-15.) The testimony, therefore, was not relevant in plaintiff's case in chief, and it did not later become relevant because no attempt was made by defendant to prove ratification. No issue was presented as to ratification and there is no finding on that subject.

Moreover, if there was any error it was corrected. The court itself asked both Dangberg and Humphrey whether they believed the bogus contract was the true contract at the time they honored the draft, and they both testified in the affirmative. [Tr. pp. 128-131.]

Anything that Dodson might have said was, in any view of the case, relevant only upon the question of the belief of Dangberg and Humphrey.

It is, of course, obvious that declarations of an agent are not competent evidence of his authority.

Attleboro Mfg. Co. v. Frankfort etc. Ins. Co., 240 Fed. 573, 581-582 (C. C. A. 1st Cir.).

From the foregoing it appears that not only is there substantial evidence in the record in support of the findings, but the evidence is overwhelmingly in their favor, and what little evidence there is to the contrary does not rise to the dignity of proof.

It is respectfully submitted that the judgment of the court below should be affirmed with costs to defendant in error Day.

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